87-1300

Supreme Court, U.S.
FILED
FEB 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. - .

In the Supreme Court of the United States.

OCTOBER TERM, 1987.

RICHARD BRUSGULIS,
PETITIONER,

v.

JUSTICES OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Question Presented for Review.

Whether the Double Jeopardy Clause bars the retrial of the petitioner after his first trial was terminated, when the prosecutor's first witness, the complaining witness, without whose testimony all other evidence was inadmissible, thrice refused to testify, and the trial judge dismissed the indictments with prejudice for failure to prosecute.

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No. - .

In the

Supreme Court of the United States.

OCTOBER TERM, 1987.

RICHARD BRUSGULIS,

PETITIONER,

v.

JUSTICES OF THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS,

RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner, Richard Brusgulis, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the First Circuit, entered on November 3, 1987, terminating the appeal of the petitioner from the denial of his petition for writ of habeas corpus.

Opinions Below.

The United States Court of Appeals for the First Circuit entered a memorandum and order (App. A, *infra*, at 1a-3a) which was not officially reported. The United States District Court for the District of Massachusetts issued a written order (App. B, *infra*, at 4a-11a) that was likewise not officially reported. The Supreme Judicial Court of the Commonwealth of Massachusetts issued an opinion (App. C, *infra*, at 12a-14a) that is reported at 398 Mass. 325, 496 N.E.2d 652 (1986). The oral rulings and findings by the trial judge, together with the transcript of the pertinent proceedings in the trial court (App. D, *infra*, at 25a-54a) are also not officially reported.

Jurisdiction.

On November 3, 1987, the memorandum and order of the Court of Appeals entered, denying the application and terminating the appeal on the petitioner's application for certificate of probable cause to appeal, pursuant to 28 U.S.C. § 2253. The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

Constitutional Provision Involved.

The Fifth Amendment to the Constitution provides, in relevant part:

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb. . . .

Statement of the Case.

The petitioner, Richard Brusgulis, was indicted by the Middlesex County, Massachusetts, Grand Jury charging him with two counts, involving both sexual intercourse or unnatural sexual intercourse and indecent assault and battery with a child, his daughter (A. 13a). The trial of these indictments began on July 10, 1985, but before the jury was impanelled the trial justice, on the defendant's motion, conducted a voir dire examination of the complaining witness, who was then three years and eight months old (A. 13a n.2), to determine her competency to testify (A. 21a-23a, 31a). He ruled that she was a competent witness (A. 31a). The jury was then sworn, and this witness began her testimony (A. 33a). After preliminary questions, she declined to testify further, and the trial justice recessed the trial for the day (A. 35a).

The next day, after the witness had resumed her testimony, she again indicated a strong disinclination to testify (A. 41a-44a). At that point in the trial, the trial justice suspended the trial and conducted a second voir dire of the witness to determine her competency (A. 23a-24a). He expressed the issue and the concern facing the court:

> THE COURT: I tell you what I am most concerned about. The witness has now twice said, in words and substance, once yesterday and once today, "I don't want to do that anymore"; "I don't want to talk about that anymore."
>
> Now that is consistent with two things. One, that she doesn't want to relive an experience or, two, that she doesn't want to persist in talking about a non-experience, that is to say, that she does not wish to go any further with a statement which she recognizes is not so.

(A. 44a-45a.)

After this inquiry, the defendant moved for a required finding of not guilty on both indictments (A. 45a). See Mass.R. Crim.P. 25. The trial justice declined to rule on the defendant's motion (A. 45a-47a), instead he allowed the trial to continue with the prosecutor continuing her direct examination of the child (A. 47a). However, the judge reserved his ultimate ruling on both the motion for a required finding of not guilty and on the competency of this witness until the conclusion of her testimony (A. 47a).

The trial then again resumed, and immediately after the witness returned to the courtroom she refused to take the witness stand (A. 48a), or to provide any further testimony (A. 49a). Her direct examination was incomplete, and the defendant did not have the opportunity to cross-examine her (A. 49a-50a). The trial justice, ruling that the prosecutor could not adduce any further evidence against the defendant because of the refusal of the complaining witness to testify (A. 50a-51a), dismissed the indictments and terminated the trial (A. 53a).

The Commonwealth appealed this ruling, pursuant to Massachusetts General Laws c. 278, § 28E (1984 ed.) (A. 13a). The Massachusetts Supreme Judicial Court (SJC) ordered the dismissal of the indictments against the defendant to be vacated and remanded the case to the Superior Court for further proceedings (A. 21a). *Commonwealth* v. *Brusgulis,* 398 Mass. 325, 334, 496 N.E.2d 652, 658 (1986).

On November 18, 1986, the petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2253, seeking to prohibit his being tried a second time on these indictments (A. 4a). See *Justices of Boston Municipal Court* v. *Lydon,* 466 U.S. 294, 303 (1984). The District Court judge issued his order denying the petition for writ of habeas corpus and allowing the respondent's motion to dismiss the petition (A. 10a-11a). The petitioner timely filed both his notice of appeal and an application for a certificate of probable cause to appeal. The District Court judge denied the application for certificate of

probable cause, and the petitioner renewed his application in the Court of Appeals (A. 1a). That court denied the application and terminated the appeal on November 3, 1987 (A. 3a).

Reasons for Granting the Writ.

The results of the decision by the SJC, which has been ratified by both the United States District Court and the United States Court of Appeals, have created an enormous exception to the Double Jeopardy Clause and to render meaningless this Court's several decisions which have drawn careful distinctions concerning the termination of criminal trials short of jury verdicts. The SJC and the Federal courts have either ordered or allowed to be retried a case in which the prosecutor had not produced and could not produce any evidence against the defendant. These courts have ignored the compelling authority of this Court, which has not been opened to reconsideration, that a determination by the trial court that the evidence is insufficient to convict is, for purposes of the Double Jeopardy Clause, an acquittal which bars retrial. *Smalis* v. *Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 1748-49 (1986). Instead, they have characterized the ruling by the trial justice on the sufficiency of the evidence as a legal determination which is subject to appellate review and, upon reversal, is not an impediment to a retrial (A. 2a, 9a-10a, 19a-20a).

If the decisions by the SJC, the District Court and First Circuit are left to stand then any trial that is terminated before the rendering of a verdict, in which the trial judge has made legal rulings, for example, on the admissibility of evidence, the competency of a witness, the scope of examination or cross-examination, the general presentation of the case, or any other

legal or procedural question, will be subject to review and retrial. The implications of such rulings can only be imagined, but their direct result is to emasculate the jurisprudence carefully developed by this Court. *Montana* v. *Hall*, U.S. , 107 S.Ct. 1825, 1826-27 (1987); *Smalis* v. *Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 1748-49 (1986); *United States* v. *Scott*, 437 U.S. 82, 88-100 (1978).

A. *Superior Court Proceedings.*

Notwithstanding the limited view taken by the reviewing courts in this case, a fair reading of the record can leave no doubt about either the proceedings as they developed in the trial court or the inability of the prosecutor to present any evidence against the petitioner. After the principal prosecution witness, the daughter of the petitioner, refused three times in two days to testify (A. 35a-36a, 41a-44a, 48a-49a), the trial justice was left with only one conclusion:

> THE COURT: Well, that is the situation we are in. The government can't go forward because the complaining witness' testimony hasn't been completed and hasn't been — and she is not subject to cross-examination, not because of illness or because of some natural catastrophe, [but] because the witness declines to continue.
>
> Now if an adult witness declined to continue, one would consider sanctions in the way of contempt and so forth. With a three and a half year old child I guess we are all in agreement, aren't we, Miss Parr [the prosecutor], that contempt is not appropriate?
>
> MS. PARR: Yes, Your Honor.

(A. 50a-51a.)

Because there existed no reasonable way of compelling the witness to testify (A. 50a-51a), because defense counsel could

not be afforded an opportunity to cross-examine this witness (A. 49a, 50a), and because the prosecutor could not produce any other evidence against the defendant (A. 30a, 50a), the trial justice ruled that the indictments must be dismissed for want of prosecution (A. 51a, 53a). Without any evidence whatsoever establishing the petitioner's guilt, the trial justice made the only determination available to him to terminate the trial in favor of the defendant. *Smalis* v. *Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745, 1748 (1986).

This legal ruling had always been contemplated by the prosecutor, who at the outset of the proceedings, before the jury had been impanelled and before the trial judge had conducted a voir dire of the complaining witness, made a very prescient statement:

> But if, in fact, the young child is unable to testify in this case. If she comes and sits here and says nothing the case ends basically. That is the reality of the situation, if the child is unable to testify that is the end of the case.

(A. 30a.)

Thus, the prosecutor acknowledged that, if the complaining witness refused to testify, there would be insufficient evidence to convict the defendant. Under these circumstances, the facts of this case fall squarely within the holding of *Cornero* v. *United States,* 48 F.2d 69 (9th Cir. 1931), which was expressly adopted by the Supreme Court in *Downum* v. *United States,* 372 U.S. 734, 737 (1963). The *Cornero* court stated: "The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy." *Cornero* v. *United States,* 48 F.2d 69, 71 (9th Cir. 1931).

The reviewing courts in this case, by casting these facts as erroneous legal rulings, subject to appellate review and reversal, have demolished the principle that:

> [A] judgment that the evidence is legally insufficient to sustain a guilty verdict constitutes an acquittal for purposes of the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 . . . (1977); *Burks* v. *United States*, 437 U.S. 1 . . . (1978); *Sanabria* v. *United States*, 437 U.S. 54 . . . (1978); *United States* v. *Scott*, 437 U.S. 82, 91 . . . (1978) (dicta); *Hudson* v. *Louisiana*, 450 U.S. 40 . . . (1981).

Smalis v. *Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 1747 (1986).

B. *Opinion by the Massachusetts Supreme Judicial Court.*

In its opinion vacating the dismissal of the indictments and remanding the case for further proceedings, the SJC focused on the trial judge's rulings on the competency of the child witness (A. 16a-19a), and virtually ignored her refusal to testify further (A. 19a). The State supreme court held that the judge's findings on the competency were both legally erroneous and the sole basis for the dismissal of the indictments (A. 18a). This opinion ignores the trial judge's ruling:

> THE COURT: I think under the circumstances the fairest thing is *to dismiss for want of prosecution, that is because a witness cannot go forward.* And that would terminate the matter at this point, and allow the Commonwealth to take whatever steps the Commonwealth thinks are appropriate.

(A. 53a.) (Emphasis added.)

These factual predicates to the order of dismissal are all based upon solid foundations within the record and the trial justice's first-hand observations of the witness. His decision concerning the witness's willingness to testify, being one of fact, is not reviewable in the ordinary course by an appellate court. *Commonwealth* v. *Tatisos,* 238 Mass. 322, 325, 130 N.E. 495, 497 (1921); *Commonwealth* v. *Widrick,* 392 Mass. 884, 888, 467 N.E.2d 1353, 1356 (1984). The SJC revision of these findings of fact is wholly inappropriate especially in this circumstance where the trial justice had the benefit of personal observation of the young witness. *Post hoc* factual conclusions based only upon a reading of the cold record cannot be a substitute for the trial court's first-hand assessments. *LaVallee* v. *Delle Rose,* 410 U.S. 690, 695 (1973); *Commonwealth* v. *Whitehead,* 379 Mass. 640, 656, 400 N.E.2d 821, 833-834 (1980); see *Commonwealth* v. *Welcome,* 348 Mass. 68, 69, 201 N.E.2d 827, 828 (1964).

The decision by the SJC, revising a clear record, which shows the principal prosecution witness's continued refusal to testify, results in the total emasculation of this Court's decisions. See, e.g., *United States* v. *Martin Linen Supply Co.,* 430 U.S. 564 (1977); *Burks* v. *United States,* 437 U.S. 1 (1978); *Sanabria* v. *United States,* 437 U.S. 54 (1978); *United States* v. *Scott,* 437 U.S. 82 (1978); *Hudson* v. *Louisiana,* 450 U.S. 40 (1981); *Smalis* v. *Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745 (1986). The trial was concluded only because no evidence could be produced against the defendant.

C. *District Court Order.*

The district court, in ruling on the petition for habeas corpus, recognized that this case "falls somewhere between the classic acquittal contemplated by case-law and the classic mistrial."

(A. 9a.) However, the court's rationale for dismissing the petition both ignores the procedural facts of the trial and presents a unique basis for denying the petitioner the protections of the Double Jeopardy Clause. The court ruled that the "prosecution was denied 'fair opportunity' to offer whatever proof it could assemble and, therefore, prosecution may fairly complain of the prejudice it suffered at that initial trial." (A. 10a.)

In fact, over two days of trial the judge exhibited ample and appropriate patience with the prosecution's witness, but it became absolutely clear that the child would not testify (A. 48a-49a). The Fifth Amendment protects the defendant, and it does not allow those protections to be discarded when the government is prejudiced. See *United States* v. *Jorn*, 400 U.S. 470, 483 (1971); *Poland* v. *Arizona*, 476 U.S. 146, 106 S.Ct. 1749, 1754 (1986). In this case, it is absolutely impossible to retry the petitioner on the pending indictments without subjecting him to a second trial before a second trier of fact. Therefore, the Double Jeopardy Clause of the Fifth Amendment absolutely prohibits any retrial of the petitioner on these indictments. *Smalis* v. *Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 1748 (1986); *Sanabria* v. *United States*, 437 U.S. 54 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977).

D. *Holding by the First Circuit.*

The Court of Appeals adopted the reasoning of the SJC that the trial judge had used an overly strict standard in evaluating the witness's competency, that the dismissal of the indictments was a legal conclusion based on a legal error which was reviewable by appellate courts, and that retrial was not barred by the Double Jeopardy Clause because the dismissal neither represented a resolution of any factual elements of the offense nor was based on either evidentiary insufficiency or prosecu-

torial misconduct (A. 2a). In addition, the First Circuit stated that the prosecutor had available at the termination of the term at least six additional witnesses (A. 2a).

This extremely awkward view of the record betrays the trial judge's appropriate patience in conducting two voir dire examinations of the witness (A. 21a-24a, 31a, 45a), and allowing the trial to be suspended twice when the witness refused to testify beyond preliminary questions (A. 35a, 41a-44a). It was only after the witness refused to testify for a third time (A. 48a-49a), that the trial judge, ruling that she was incompetent and thus beyond the reach of traditional contempt sanctions (A. 50a-51a), acted to conclude the proceedings (A. 53a). In fact, because of the nature of the other witnesses' testimony they could not testify if the complaining witness refused to offer any evidence, a procedural fact first identified by the prosecutor and never contradicted (A. 30a, 50a).

The trial justice's findings of fact were neither hastily made nor poorly supported. As such they are presumed to be correct, absent extraordinary circumstances, not present in this case. 28 U.S.C. § 2254(d); *LaVallee* v. *Delle Rose*, 410 U.S. 690, 695 (1973); *Le Page* v. *Picard*, 495 F.2d 26, 27-29 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974); *Westberry* v. *Mullaney*, 406 F.Supp. 407, 411 (D. Me.), *aff'd sub nom. Westberry* v. *Murphy*, 535 F.2d 1333, 1334 (1st Cir. 1976).

Conclusion.

The petitioner's first trial was concluded only because there was insufficient evidence introduced by or available to the prosecution to sustain a conviction. The SJC and the Federal courts reviewing the case have ignored clear and well established Supreme Court precedent and have created an enormous

exception to the protections of the Double Jeopardy Clause. If allowed to stand, every criminal trial terminated before the rendering of a jury verdict will be subject to appellate review, and no defendant will enjoy this constitutional protection. For these reasons the writ should issue.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
for the First Circuit.

No. 87-1579.

RICHARD BRUSGULIS,
PETITIONER, APPELLANT,

v.

JUSTICES OF THE SUPERIOR COURT OF
THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENTS, APPELLEES.

BEFORE
COFFIN, BREYER AND SELYA,
CIRCUIT JUDGES.

MEMORANDUM AND ORDER

Entered November 3, 1987

The petitioner has requested a certificate of probable cause so that he may perfect his appeal from the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2253. After a careful review of the record, we concluded that petitioner has failed to make "a substantial showing of the denial of a federal right" as required by *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1985), and is therefore not entitled to the issuance of certificate of probable cause. The petitioner's previous request for a certificate of probable cause was denied by the district court.

In order to avoid being tried a second time on indictments brought against him in the Middlesex Superior Court, the petitioner filed a petition for a writ of habeas corpus with the district court, claiming that the occurrence of further proceedings would violate the Double Jeopardy Clause of the Fifth Amendment. The indictments against petitioner were dismissed with prejudice by the trial court at the request of petitioner's counsel. The dismissal occurred because the trial court determined that the first witness, the 3½ year-old victim, was not competent to testify. The Supreme Judicial Court of Massachusetts vacated the order of the trial court, and remanded the case for further proceedings, concluding that: (1) the trial court had used an overly-strict standard in evaluating the witness's competency which undermined the dismissal of the indictments; (2) the dismissal with prejudice was a legal conclusion based on a legal error and was therefore reviewable; and (3) retrial was not barred by the Double Jeopardy Clause because the dismissal did not represent a resolution of any factual elements of the offense, nor was it based on evidentiary insufficiency or on prosecutorial misconduct. *Commonwealth* v. *Brusgulis*, 398 Mass. 325, 333 (1986).

We agree with the analysis of the Supreme Judicial Court. Additionally, we note that the Supreme Court's decision in *United States* v. *Scott*, 437 U.S. 82 (1978) offers a clear response to petitioner's double jeopardy argument. *Scott* held that where, as here, a defendant deliberately seeks to terminate proceedings against him on a basis unrelated to guilt or innocence of the offense charged, he suffers no injury under the Double Jeopardy Clause if the government is allowed to appeal from a ruling in favor of a defendant. *Id.* at 99. Dismissal of indictments based on the alleged incompetence of a single witness, where the prosecution has expressed an intention to present at least six additional witnesses, cannot reasonably be interpreted to have any bearing on the guilt or innocence of a defendant or on the sufficiency of evidence to sustain a conviction.

Petitioner's reliance on *Picard* v. *Commonwealth*, 400 Mass. 115 (1987) is misplaced. *Picard* held that the Double Jeopardy Clause barred retrial of the defendant after a mistrial had been declared at the request of the prosecution, over the objection of the defendant. The circumstances of the dismissal of the indictments against petitioner are clearly distinguishable.

For the foregoing reasons, we concluded that the petitioner's application for a certificate of probable cause should not properly go forward. The appeal is hereby terminated.

By the Court,

Francis P. Scigliano
Clerk.

[cc: Messr. [*sic*] Morris and Ms. Beck]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD BRUSGULIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 86-3341-N
	)	
JUSTICES OF THE	)	
SUPERIOR COURT,	)	
Respondents.	)	

ORDER

NELSON, D.J. APRIL 27, 1987

The above-entitled action was brought as a Petition for Writ of Habeas Corpus in accordance with 28 U.S.C. § 2254. Petitioner has brought the writ to challenge the constitutionality of a second trial of his case scheduled to commence on or about March 31, 1987.

Initially petitioner Brusgulis was charged on two counts. Count one charged petitioner with the rape or abuse of a child under sixteen (16) years of age. The second count charged petitioner with indecent assault and battery of a child under fourteen (14) years of age. At the first trial the court dismissed the petitioner's indictments with prejudice. The prosecution appealed the dismissal with prejudice directly to the Supreme Judicial Court in *Commonwealth* v. *Brusgulis*, 398 Mass. 325, 496 N.E.2d 652 (1986). Thereupon, the Supreme Judicial Court reversed the prior trial court ruling and remanded the case for a second trial. *Commonwealth* v. *Brusgulis*, 398 Mass. 325, 334, 496 N.E.2d 652 (1986).

Petitioner maintains that this proposed second trial has triggered a series of violations of his constitutional rights notably that (1) by being held in the custody of the Commonwealth violates petitioner's Fifth Amendment rights under the United States Constitution and that (2) by having to submit to a second trial he will be placed twice in jeopardy based on the indictments originally issued against him by the Middlesex Superior Court, in violation of the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution.

In response to petitioner's allegations, the Justices of the Superior Court have moved to dismiss the petition on the ground that the petitioner has failed to state a claim upon which relief may be granted. The Justices advance the argument that petitioner has failed to state a "colorable" double jeopardy claim.

This court hereby agrees with the Justices' statement of the applicable principles of law. The trial court's dismissal of petitioner's case with prejudice did not amount to an acquittal of that case on the merits. Consequently, the Double Jeopardy Clause of the Fifth Amendment does not operate to bar the subsequent retrial of the case. In accordance with this reasoning this court now DENIES petitioner's Writ of Habeas Corpus and ALLOWS the respondents' Motion to Dismiss.

The writ of habeas corpus may be properly issued to a prisoner in any of four situations outlined at 28 U.S.C.A. § 2241(c). The provision to be found at 28 U.S.C.A. § 2241(c)(3) most directly applies to petitioner's case. That provision stipulates that, in order for the writ to issue, petitioner must establish that he is being held in custody in "violation of the Constitution or laws . . . of the United States." Specifically, in this case, petitioner must successfully allege and prove that his detention pending the second scheduled trial is unconstitutional because that second scheduled trial is barred by the Double Jeopardy Clause. This court concludes otherwise

and rules that a writ of habeas corpus, pursuant to 28 U.S.C.A. § 2241(c), should not issue because petitioner has failed to allege and to prove that his upcoming trial is barred by the Double Jeopardy Clause of the Fifth Amendment. The factors which have led to the court's conclusion are discussed below.

The general rule is that double jeopardy concerns adhere whenever a defendant is tried twice by the same sovereign for an act or acts arising out of the same or similar facts amounting to a legally actionable offense. *Bradley* v. *Hartigan*, 612 F. Supp. 795 (D.C. Ill. 1985), citing to *United States ex rel. Clauser* v. *McCevers*, 731 F.2d 423, 425 (7th Cir. 1984) (citing *United States* v. *Dinitz*, 424 U.S. 600, 606, 96 S.Ct. 1075, 1078, 47 L.Ed. 2d 267 (1976). The double jeopardy clause is usually invoked to prohibit the second trial of a person who has been previously acquitted, convicted or pardoned for the same offense. U.S.C.A. Const. Amend. 5, *Gwinn* v. *Deane*, 613 F.2d 1, (U.S.C.A. 1st Circuit 1979). Jeopardy attaches when the jury is impaneled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 98 S.Ct. 2, 56, 57 L.Ed.2d 24 (1978). The most frequently-cited exception to the general double jeopardy rule is the mistrial exception.[1] If defendant's first trial was a mistrial — or sufficiently analogous thereto — then the basic double jeopardy rule is inapplicable. The first trial is deemed to have not been a full trial on the merits within the meaning of the jeopardy clause. Consequently, no jeopardy attaches at the time of the second trial.

Analytically, then, this court must determine whether or not the initial dismissal with the prejudice is best likened to a full trial on the merits or to a mistrial. Should the court determine that the initial proceeding was in effect a full trial, then the

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[1] Apparently it is current practice in some jurisdictions to treat a dismissal with prejudice as tantamount to an acquittal for double jeopardy purposes. See, *e.g.*, *Bradley* v. *Hartigan*, 612 F. Supp. 795 (D.C. Ill. 1985).

Double Jeopardy Clause would operate to bar retrial of those same issues originally tried in the initial proceeding. "It is of essence of "double jeopardy" that there be risk of at least two trials, and double jeopardy clause is usually invoked to prohibit second trial of person who has been previously acquitted, convicted, or pardoned for same offense, . . ." *Gwinn* v. *Deane, supra*. If, on the other hand, the court determines that the initial proceeding may be most accurately likened to a mistrial, then the Double Jeopardy Clause will pose no obstacle to petitioner's subsequent trial. *United States* v. *Borokinni*, 748 F.2d 286 (C.A. Va. 1984), "[g]enerally, double jeopardy clause does not prevent government from forcing a criminal defendant to submit to a second trial where the first trial ended in a mistrial, nor does the clause prohibit retrial after a conviction has been reversed on any other ground other than insufficiency of the evidence"; *United States* v. *Carrasquillo*, 677 F.2d 225 (C.A. N.Y. 1982) "double jeopardy clause does not bar use of criminal charges contained in an indictment which has been dismissed with prejudice in a parole revocation proceeding"; *United States* v. *Cox*, 683 F.2d 871 (C.A. Ariz. 1980) [a second trial after a declaration of mistrial in the first proceeding did not "subject defendant to double jeopardy."]

In response to petitioner's Habeas Corpus Writ, the respondents make two basic arguments: The first argument respondents advance is that petitioner's allegations fail to state a "colorable" double jeopardy claim because the protection of the Double Jeopardy Clause applies only if there has been an event such as an acquittal which terminates the original jeopardy. *Justices of Boston Municipal Court*, 466 U.S. 294 (1981). The second argument respondents make is that in the present case there has been no acquittal or an equivalent ruling on the sufficiency of prosecutor's evidence. This court finds this conclusion to be wholly consistent with the record before it in that it is clear that the trial court judge did not afford the

prosecution the opportunity to present all of its evidence.[2] Respondents further argue that in essence petitioner obtained a mid-trial termination of trial before any determination of factual guilt or innocence. In such a case the principles of the Double Jeopardy Clause do not bar retrial. *United States* v. *Scott*, 487 U.S. 82, 98-100 (1979).

Petitioner contradicts respondents' analysis with the argument that double jeopardy protection is now due to petitioner because at the initial trial the jury had been impaneled and testimony had been elicited. The petitioner had thereby been placed in jeopardy by implication and by passive acknowledgment. *See Downum* v. *United States*, 372 U.S. 734, 735-758 (1963). Petitioner also alleges that respondents' analysis fails to controvert petitioner's citation of legal authority establishing that jeopardy had attached at the time of the first trial. Further, even if the trial judge's ruling, ending with the trial before a verdict, was erroneous, the court's acquittal of the petitioner on the merits bars retrial. *United States* v. *Wilson*, 420 U.S. 332, 345 (1975).

This court concludes that the applicable case law comports substantially with respondents' analysis. In accordance with this determination this court hereby ALLOWS the respondents' Motion to Dismiss. In the same vein, since the court concludes that double jeopardy does not preclude petitioner's imminent trial, petitioner's Writ of Habeas Corpus is hereby DENIED.

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[2] In at least one other jurisdiction the court has held that the "[d]ouble jeopardy clause did not prevent second trial of habitual offender charge, . . . where state appellate court determined that trial court had committed error in excluding state's proffered evidence and that trial court error had made it impossible for state to present sufficient evidence to the jury." *Duffel* v. *Dutton*, 785 F.2d 131 (C.A. Tenn. 1986). This case is similar to the case at bar in that the Massachusetts Supreme Judicial Court has reversed the prior trial court ruling and remanded the case for a second trial. *Commonwealth* v. *Brusgulia*, [*sic*] 398 Mass. 325, 334, 496 N.E.2d 652, 661 (1976).

The case-law cited by the parties supports the basic proposition that an acquittal of a petitioner on the merits bars subsequent retrial of that claim. *United States* v. *Wilson, supra*, stands for the proposition that where a ruling "in effect" is tantamount to an acquittal, the double jeopardy clause bars review of the District Court's ruling.

The core issue of this case amounts to an inquiry as to whether or not the original dismissal "with prejudice" amounted to an acquittal within the meaning of the *Wilson* case. If it is deemed an acquittal, the law is clear: subsequent trial of the case will be barred by the application of the Double Jeopardy Clause. However, if the dismissal with prejudice is deemed to be something other than an acquittal for double-jeopardy purposes, then double jeopardy will not operate to bar the subsequent retrial.

The case before the court falls somewhere between the classic acquittal contemplated by case-law and the classic mistrial. As stated previously, double jeopardy will invariably bar retrial after an acquittal, because if and when the defendant were retried by the same sovereign after an acquittal on the same charges upon which the acquittal was based, he would have been placed twice at jeopardy for the same offense. The opposite principle holds true where a mistrial occurs. A subsequent trial — after a mistrial — does not run afoul of the Double Jeopardy Clause. The dismissal with prejudice in this case best approximates the mistrial scenario for the primary reason that the dismissal with prejudice did not occur after a full trial on the merits. In the initial trial the court did not come to any factual determinations about defendant's ultimate guilt or innocence in the face of the charges brought against him.

In defendant's initial trial, the trial judge essentially "aborted" defendant's right to "have his trial completed by a particular tribunal," *United States* v. *Scott, supra*, pp. 99-100

citing to *United States* v. *Jorn*, 400 U.S. 470, 484 (1971). The judge accomplished this when he dismissed the case with prejudice notwithstanding the likelihood of bringing the trial to full fruition without soliciting the controverted testimony of the Brusgulis child. *Commonwealth* v. *Brusgulis*, 378 Mass. 325, 496 N.E.2d 652 (1976). Secondly, the initial *Brusgulis* case, though not a mistrial, was a "termination of the trial in his [Brusgulis'] favor" before the "determination of factual guilt or innocence." *Wilson, supra*, at 94. Ordinarily after such a court termination, the prosecution must seek reversal of the trial court decision and then reprosecute. *Wilson*, at 94. In short:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect.

Burks v. *United States*, 437 U.S. 1, 15-16 (1978). In the original *Brusgulis* case, prosecution was denied "fair opportunity" to offer whatever proof it could assemble and, therefore, prosecution may fairly complain of the prejudice it suffered at that initial trial.

For the above-outlined reasons, this court concludes that petitioner Brusgulis' proposed retrial does not pose traditional double jeopardy hazards. Consequently, that trial is not precluded by operation of the Double Jeopardy Clause. Consistent with this reasoning, respondents' Motion to Dis-

miss is hereby ALLOWED and petitioner's Writ of Habeas Corpus is hereby DENIED.

SO ORDERED.

/s/David S. Nelson
DAVID S. NELSON
UNITED STATES DISTRICT JUDGE

COMMONWEALTH *vs.* RICHARD BRUSGULIS.

No. 4087

Middlesex. May 7, 1986. — August 25, 1986.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & LYNCH, JJ.

Witness, Competency, Child, *Practice, Criminal,* Dismissal. *Constitutional Law,* Double jeopardy.

A judge applied an incorrect and overly stringent legal standard in determining that a child, aged three years and eight months, was incompetent to testify at a criminal trial because of her inability to explain the concept of "punishment" as a consequence for telling a lie. [329-330]

Where the judge at a criminal trial, following the first of two hearings on a child's testimonial competency concluded that the child, aged three years and eight months, knew "the difference between telling the truth and telling a lie," it was within the judge's discretion to rule at that point that she was competent to testify. [331]

A judge who has ruled that a witness is competent to testify may, at a later point in the trial, reconsider his ruling either on his own initiative or on motion, if he entertains doubt about its correctness. [331]

Statement concerning the latitude allowed a judge in devising trial procedures and modifying the usual rules of trial to accommodate child witnesses or other witnesses with special needs. [332]

Double jeopardy principles did not bar the retrial of a defendant following a judge's erroneous dismissal, "with prejudice," of the indictments against him, where the judge's action did not represent a ruling on the sufficiency of any element of the Commonwealth's proof and did not result from any prosecutorial misconduct. [332-333]

INDICTMENTS found and returned in the Superior Court Department on May 7, 1985.

Motions to dismiss were heard by *Hiller B. Zobel,* J.

The Supreme Judicial Court transferred the case on its own initiative.

Margot Botsford, Assistant District Attorney, for the Commonwealth.

Paul A. D'Agostino for the defendant.

ABRAMS, J. Pursuant to G. L. c. 278, § 28E (1984 ed.),[1] the Commonwealth appeals from an order of a judge in the Superior Court allowing the defendant's motions to dismiss two indictments with prejudice after a jury trial had begun. The indictments charged the defendant with rape of a child under sixteen and indecent assault and battery of a child under fourteen. G. L. c. 265, § § 23 and 13B (1984 ed.). The indictments arose from an incident alleged to have occurred during a weekend in March, 1985, when the child, who was approximately three and a half years old,[2] was visiting the defendant at his home.

At the trial, the judge conducted a competency hearing before the jury was empanelled. In examining the child, he asked some preliminary questions (name and address, age and birthdate, school and play activities) and then interrogated her about truth and lying.[3] He supplemented his original line of inquiry with further questions based on suggestions offered by defense counsel. At the end of the hearing, the judge determined that the child was competent to testify. He based this determination on his conclusion that she could differentiate between telling the truth and lying and could understand that punishment was a consequence of lying. The judge remarked: "I don't know how one can get any further with that, even with a person over the age [of] seven. They may know what the specific punishment is. The concept of punishment seems to be adequate for

[1] General Laws c. 278, § 28E (1984 ed.), provides, in pertinent part: "An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all criminal cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion for appropriate relief under the Massachusetts Rules of Criminal Procedure." The availability of appellate review under the first clause is not limited to pretrial dismissals. See *Commonwealth* v. *Lam Hue To*, 391 Mass. 301, 306 & n.4 (1984). Thus, the Commonwealth has a statutory right to review of the dismissal. See *Commonwealth* v. *Therrien*, 383 Mass. 529, 532 (1981).

[2] The child was three years and four months old at the time of the alleged offenses. At the time of trial, she was three years and eight months old.

[3] See Appendix for the questions and responses.

this child. . . . I am persuaded she understands that if you tell a lie you get punished."

Subsequently, the jury was empanelled and sworn. The prosecutor made an opening statement. The judge then gave some preliminary instructions to the jurors and called a brief recess. At that point, it was approximately 12:30 P.M. The prosecutor asked the judge to recess the trial until the next morning because the child, who had been in court for five hours, was upset and crying. The judge denied this request, and the child took the stand.

On direct examination, the child stated that it was bad to tell a lie and that "you get punished" if you do so. She testified that the defendant had hurt her. When asked where she had been hurt, she put her hands in the area between her legs. However, when the prosecutor asked the child to demonstrate with anatomical dolls how she was hurt, the child repeatedly said that she did not want to do so. The trial was adjourned until the following morning.

When the child resumed testifying, she again stated that the defendant had hurt her and identified the area between the doll's legs as the area of her body where she had been hurt. When asked to provide further details of the incident, evidently she became quite upset. She would not describe what happened any further, saying repeatedly that she had already told how she got hurt and did not want to talk about it any more.

At the prosecutor's request, the judge called a recess. During the recess, defense counsel moved for a required finding of not guilty or a dismissal with prejudice. He argued that the child was not competent to testify.[4] The prosecutor pointed out that defense counsel's arguments related to credibility not competency, but she did not object to the judge's conducting a second competency examination.[5]

[4] Defense counsel stated: "I think it is almost a conclusive presumption that she isn't competent to testify at the age of three and a half because of the way questions are being asked and because of the reluctance of this little girl to testify, it's obvious she has been rehearsed a number of times."

[5] The judge noted that he was satisfied that the child had a "sufficient grasp" of the difference between fantasy and reality to go forward but "[t]hat

In the course of the second examination,[6] the child said that "[t]he truth is the thing you want and a lie you don't." She also said, "You get punished" for telling a lie, but "You don't get punished" for telling the truth. However, she could not define the word "punishment" or associate it with such terms as "spanking," "licking" or "whipping." Defense counsel objected to the prosecutor's suggestion to frame the question in terms of whether it was good or bad to be punished rather than defining the word.[7] The judge sustained the objection.

Defense counsel renewed his motions for a required finding of not guilty or, alternatively, dismissal with prejudice. The prosecutor objected, suggesting that a mistrial would be the appropriate remedy if the judge found the child incompetent. The judge expressed misgivings about the child's competency based on her inability to define the word "punished" or "certain of the more common phrases for the more common method of punishing a child." He equated this inarticulation with an inability to understand the consequences of lying. He decided to permit the prosecutor to complete her examination of the child in order to ascertain if the child understood the consequences of lying. The child, however, refused to testify. Defense counsel renewed his motions; the judge ruled that the child was incompetent as a matter of law because she "cannot tell me or would not tell me, what punishment meant." The judge added that his ruling was "fortified" by the fact that the child refused to testify.[8] Over the prosecutor's objection, the

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is not what we are talking about now. What we are talking about now is a way of eliciting information from a child."

[6] Excerpts from this examination are set forth in the Appendix.

[7] The prosecutor's rationale was "so we can distinguish what she knows, because I think that is the important thing, not to know what that word [punished] is so much as to know what is good or bad and what you are supposed to do and what you are not supposed to do."

[8] The judge made these remarks even though a note had just been delivered to the courtroom indicating that the child said she would come back and answer defense counsel's questions.

judge then granted the defendant's motions to dismiss with prejudice for want of prosecution.[9]

1. *Competency of child witness.* The Commonwealth argues that the judge's dismissal of the indictments was improper because it was based on an erroneous ruling of law. See *Commonwealth* v. *Babb,* 389 Mass. 275, 283-284 (1983). The Commonwealth challenges the judge's determination that the child witness was incompetent to testify as a matter of law. Alternatively, the Commonwealth argues that the judge abused his discretion by reopening the subject of the witness's competency after having earlier ruled her competent.

General Laws c. 233, § 20 (1984 ed.), provides in part: "Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal . . . ." The courts of this Commonwealth have long applied a two-prong test to determine competency: (1) whether the witness has the general ability or capacity to "observe, remember, and give expression to that which she ha[s] seen, heard, or experienced"; and (2) whether she has "understanding sufficient to comprehend the difference between truth and falsehood, the wickedness of the latter and the obligation and duty to tell the truth, and, in a general way, belief that failure to perform the obligation will result in punishment." *Commonwealth* v. *Tatisos,* 238 Mass. 322, 325 (1921). See also *Commonwealth* v. *Widrick,* 392 Mass. 884, 888 (1984); *Commonwealth* v. *Gibbons,* 378 Mass. 766, 770 (1979); *Commonwealth* v. *Welcome,* 348 Mass. 68, 70 (1964). The same test applies to all witnesses, whether adult, child, or subject to some disability. See *Commonwealth* v. *Whitehead,* 379 Mass. 640, 656 (1980), and cases cited. "The determination of competency is peculiarly within the province of the judge." *Widrick, supra* at 888. The judge is afforded wide discretion — indeed, is obliged — to tailor the competency inquiry to the particular circumstances

[9] In addition to presenting the child's testimony, the prosecutor anticipated presenting evidence from the child's mother, stepfather, three emergency room physicians, and the police. This evidence consisted of fresh complaint testimony as well as personal observation and medical records.

and intellect of the witness. Although the judge's determination will seldom be faulted on appellate review, *Whitehead, supra,* as with other discretionary rulings it will be reversed where the judge applies an incorrect legal standard. *Commonwealth* v. *Mullins,* 2 Allen 295, 296 (1861). See *Fletcher* v. *Cape Cod Gas Co.,* 394 Mass. 595 (1985); *Southwick* v. *Massachusetts Turnpike Auth.,* 339 Mass. 666, 669 (1959).

In this case, both the defendant and the judge focused their competency concerns on the witness's awareness of the obligation to tell the truth. On the first day of trial, the judge conducted a competency hearing and concluded "that the child does know the difference between telling the truth and telling a lie" and therefore ruled her competent. The next day, the judge conducted another competency hearing and ruled her incompetent because she was unable to explain to him the meaning of "punishment."

There is no requirement that a witness be able to explain "punishment"; it is particularly inappropriate to expect a three and a half year old to define that abstract concept.[10] As we stated in Tatisos, the witness must at least "in a general way, [express a] belief that failure to perform the obligation [to tell the truth] will result in punishment"; but a "child need not and probably will not understand this in all its fulness; it is unnecessary for her to do so." *Id.* at 325-326. If the witness does not possess "the necessary understanding to comprehend the nature of the obligation imposed by the oath of a witness, he may be instructed in open court, or his testimony deferred until such instruction has been given." *Id.* We therefore conclude that the judge applied an incorrect and too stringent legal standard in determining the witness's competency.[11]

[10] At the prosecutor's suggestion, the judge did ask the witness whether she knew the terms "licking," "spanking," or "whipping." Rather than listing all possible punishments and perhaps frightening the child, it would have been appropriate for the judge to frame his questions after asking the witness's mother what forms of punishment the witness might recognize and understand.

[11] We also note that the judge incorrectly characterized his competency ruling "as a matter of law." Clearly the ruling was a finding based on facts, and not a determination that a child of three years and eight months is not competent as a matter of law.

The judge's ruling need not be set aside, however, if, applying the correct legal standard, it would have been an abuse of discretion to find the witness competent. We cannot so say. The witness was three and a half years old. She clearly knew the difference between telling the truth and telling a lie; that "[t]he truth is the thing you want and a lie you don't"; that "you don't get punished for telling the truth"; but "you get punished" for telling a lie. The witness knew she was supposed to tell the truth and understood that undesirable consequences flowed from telling a lie. Beyond that, it would have been for the jury to decide if the witness testified truthfully. We cannot say that the judge abused his discretion in his earlier ruling that the witness was competent. Nor would a ruling that the witness continued to be competent have been an abuse of discretion.

The judge's application of an incorrect legal standard in determining the witness's competency undermines the dismissal of the indictments. However, before considering the appropriate disposition of this case, we take this opportunity to furnish additional guidance to the trial courts and parties on competency of child witnesses.

The Commonwealth suggests that the judge abused his discretion by reopening the competency question after he had already ruled the witness competent. Although competency must of course be determined before a witness testifies, the judge may reconsider his decision, either sua sponte or on motion, if he entertains doubts about the correctness of the earlier ruling. See *Whitehead, supra* at 655 & n.16. While the judge must be careful not to invade the jury's province of deciding the witness's credibility,[12] he may consider whether the witness's performance on the stand demonstrates a lack of awareness of the obligation to tell the truth or an inability to observe, remember, and recount.

[12] The defendant repeatedly challenged the witness's competency on the ground that she had been "rehearsed" by her mother, the prosecutor, and the victim witness advocate. Whether a witness testifies truthfully or according to some fictional script is for the jury to decide. The same may be said of the defendant's suggestion that the witness finagled candy from the prosecutor in exchange for her testimony.

The witness's *competency* must not be confused with *unavailability* to testify.[13] In this case, the child witness evidently became up set when asked to relate in detail an alleged episode of sexual assault. The court should have allowed the witness sufficient time to regain her composure before further considering the issue of her competency. Although a court need not tolerate excessive and repeated delays, judges must be sensitive to a child's limited stamina. Judges have considerable latitude in devising procedures and modifying the usual rules of trial to accommodate child and other witnesses with special needs, so long as the defendant's fair trial rights are not violated. Where such procedures may be necessary, they should be discussed in pretrial conference so that the defendant has adequate notice and so that potential problems can be considered with greater deliberation than when they arise mid-trial.

2. *Double jeopardy*. The judge's competency ruling and, consequently, the dismissal with prejudice of the indictments for want of prosecution were based on a legal error and therefore may be set aside. *Commonwealth* v. *Babb*, 389 Mass. 275, 283-284 (1983). The judge's conclusion that the dismissals were with prejudice so that there could be no retrial is a legal conclusion subject to appellate review. Clearly, however, the indictments may not be reinstated and the defendant retried if to do so would violate principles of double jeopardy.[14]

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[13] That may have happened here. Before ruling the witness incompetent, the judge characterized the situation as "one in which a witness, for whatever reason not the fault of the defendant, is not available for cross-examination by the defendant." He then invited argument from counsel on the appropriate disposition of the case, given that circumstance. Only later did he rule the witness incompetent and refuse to allow her to resume her testimony, despite her expressed willingness to do so. See note 8, *supra*.

[14] The protection against double jeopardy in this Commonwealth is based not only on the Federal Constitution, but also on a statute and the common law. See *Commonwealth* v. *Steward*, 396 Mass. 76, 78 (1985). We have not addressed whether it is also within the due process protections of art. 12 of the Massachusetts Declaration of Rights and need not do so in this case. See *Lydon* v. *Commonwealth*, 381 Mass. 356, 366, cert. denied, 449 U.S. 1065 (1980). The defendant does not argue that in the circumstances of this case the various State sources offer more or different protection than the Federal Constitution. We therefore do not consider whether any differ-

The judge dismissed the indictments on the defendant's motion. Although "the double jeopardy clause does not necessarily prevent retrial of a defendant whose motion to dismiss his indictment, made after jeopardy has attached, is allowed," *Commonwealth* v. *Lam Hue To*, 391 Mass. 301, 311 (1984), citing *United States* v. *Scott*, 437 U.S. 82, 96-97 (1978), it does prevent retrial where the dismissal "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged," *Babb, supra* at 281, quoting *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), or where the dismissal is based upon "prosecutorial misconduct." *Lam Hue To, supra* at 311-312. See also *Smalis* v. *Pennsylvania*, 106 S.Ct. 1745, 1748-1749 (1986). Neither circumstance is present here. The judge refused the defendant's repeated request for a required finding of not guilty and did not otherwise indicate a ruling on the sufficiency of the Commonwealth's proof.[15] Nor was there any prosecutorial misconduct. Analytically, then, the dismissal of the indictment should be treated the same as a motion for mistrial. *Lam Hue To, supra* at 311. The usual rule is that "a mistrial granted upon the defendant's request does not present a bar to retrial on double jeopardy grounds." *Id.* at 310. *Babb, supra* at 282. See *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982); *United States* v. *Scott*, 437 U.S. 82, 93 (1978).

We recognize that there may be some unfairness if this case is retried. In the year that has passed since the original trial, the witness's competency may have grown. On the other hand, her recall of the incident may have diminished. In any event, these potential variations in the strength of the Common-

ences do exist. Cf. *Berry* v. *Commonwealth*, 393 Mass. 793, 797-799 (1985) (greater protection under common law than under Federal constitution where Commonwealth has had "*one full opportunity*" to obtain conviction, fails to present evidence sufficient to support a conviction, defendant moves for required finding of not guilty, and judge declares mistrial after jury fails to agree on a verdict).

[15] The Commonwealth had not yet closed its case. See notes 8 & 9, supra. Thus, a ruling granting the defendant's motion for required finding of not guilty would have been premature. See Mass. R. Crim. P. 25 (a), 378 Mass. 896 (1979).

wealth's case are a consequence of the defendant's tactical choices at trial.[16] We cannot say that the defendant is unfairly prejudiced thereby.

3. *Conclusion*. The court's order dismissing the indictments against the defendant is vacated and the case is remanded to the Superior Court for further proceedings.

So ordered.

APPENDIX

The witness was questioned by the judge on two occasions. Excerpts from both competency hearings are set forth as follows:

"Q. Do you know what it is to tell the truth?
"A. Uh-huh.
"Q. What does it mean to tell the truth?
"A. To tell what really happened.
"Q. What does it mean to tell a lie?
"A. Punished.
"Q. You are punished if you tell a lie?
"A. Uh-huh.
"Q. What is a lie?
"A. You get punished."

The judge then asked the name of her stepfather (Billy).

"Q. If his name was Billy and you said his name was George would that be the truth or a lie?
"A. A lie.
"Q. Can you give me another for instance of what a lie is?
"A. A lie is that you get punished.
"Q. If I said your name was Julie, would that be the truth or a lie?
"A. A lie.
"Q. If I said that this robe is colored pink (indicates judge's robe) what would that be?
"A. A lie.
"Q. Why would it be a lie?
"A. Because it's black.
"Q. And if I said that I am holding up seven fingers, what would that be?

[16] Despite the judge's expressed uncertainty about the appropriate resolution of the unanticipated problem that had arisen, defense counsel refused the judge's offer to research and brief the issue and repeatedly demanded that the judge rule immediately. Over the prosecutor's objection, the judge did so. In these circumstances, the defendant may not be heard to complain.

"A. A lie.
"Q. Why? Why would it be a lie?
"A. Because.
"Q. TELL me.
"A. Because.
"Q. Because, because -- because why?
"A. Because it's five, four, three, all the fingers.
. . . .
"Q. How high can you count?
"A. One, two, three, four, five, six.
"Q. Can you count any higher than six.
"A. No.
"Q. Even if you tried hard?
"A. No.
"Q. Okay. Is that the truth or a lie?
"A. The truth.
"Q. What's the best thing to do, to tell the truth or to tell a lie?
"A. [Unresponsive.]
". . . .
"Q. You have a little bruise on your arm. . . . Does that hurt?
"A. No.
"Q. Is that the truth?
"A. Yeah.
"Q. Why is it the truth? Why do you think it's the truth?
"A. Because.
"Q. If it did hurt and you told me it didn't hurt, what would that be?
"A. A lie.
"Q. If it didn't hurt and you told me that it did hurt, what would that be?
"A. A lie."
"Q. If it didn't hurt and you told me that it did hurt, what would that be?
"A. A lie."

The following are questions suggested by defense counsel:

"Q. You know what I didn't ask you. How tall are you?
"A. Big.
"Q. You are big? You are a big girl?
"A. Yes.
"Q. You are going to be four in November?
"A. Yes.
"Q. Is that the truth?
"A. Yes.
"Q. Is that a lie?
"A. It's the truth.
"Q. Is it a lie, though?
"A. No, it's the truth.

"Q. Can something be the truth and a lie at the same time?
"A. No. I said it's only the truth.
"Q. Can something be true at the same time that it's a lie?
"A. No.
"Q. Can a person say something that is true and a lie at the same time?
"A. No.
". . . .
"Q. How did you learn that you get punished when you tell a lie?
"A. Just punished.
"Q. But how did you know that?
"A. Because.
". . . .
"Q. Did someone tell you if a person tells a lie, a person gets punished?
"A. Ya.
"Q. Who told you that?
"A. Grammie.
". . . .
"Q. Is that your grandmother.
"A. Uh-huh.
"Q. Is that true that if you tell a lie you get punished?
"A. Ya."

Some of the questions and responses on the second competency hearing:

"Q. Can you tell me the difference between the truth and a lie?
"A. Yes.
"Q. What's the difference?
"A. The truth is the thing you want and a lie you don't.
"Q. The truth is the thing you want —
"A. Yeah. The truth is the truth.
"Q. What happens when you tell the truth?
"A. You don't get punished.
"Q. You don't get punished?
"A. No.
"Q. And what happens when you tell a lie?
"A. You get punished.
"Q. What does punished mean?
"A. I don't know.
"Q. You don't know what punished means?
"A. No."
". . . .
"Q. What I want to know is, if you tell a lie you get punished, what happened to you? Can you tell me that?
"A. Uh-huh.
"Q. Tell me.
"A. You tell the truth.

"Q. What does it mean to get punished.
"A. You get punished.
"Q. What happens when you get punished?
"A. I don't know. What did you want me to say? Do you know?
"Q. Why did you say to me that when you tell a lie you get punished?
"A. Because I did.
". . . .
"Q. What is spanking?
"A. You know this thing — Ivory Snow.
"Q. What is a spanking . . . do you know what a spanking is?
"A. No.
"Q. You don't know what a spanking is?
"A. No. Do you?
"Q. I asked you first.
"A. Do you?
"Q. Do you know what a spanking is?
"A. No.
"Q. Do you know what a licking is?
"A. No."
"Q. Do you know what a whipping is?
"A. No.
"Q. Do you know what a potch is?
"A. No.
"Q. Do you know what being a bad girl is?
"A. No.
"Q. Does anyone ever tell you you are a bad girl?
"A. No.
"Q. No?
"A. Uh-huh.
"Q. What happens to you if somebody says you are a bad girl?
"A. I don't know."

Appendix D.

Relevant Portions of Transcript.

July 9, 1985

. . . . . .

[10] *Hearings on preliminary matters and collateral motions, which are not material to the issue raised, have been omitted.*

THE COURT: Now, is there any objection to — well, I think it is mandatory almost that the Court has to conduct a voir dire of the complaining witness to determine her competency.

MS. PARR [the prosecutor]: That is correct, Your Honor.

THE COURT: Now what I will do with respect to your motion for voir dire examination re competency. You say there is an affidavit **[11]** in support of this, but I don't have the affidavit, Mr. D'Agostino.

MR. D'AGOSTINO [defense counsel]: Are you talking to me, Your Honor?

THE COURT: Yes, Mr. D'Agostino.

It doesn't make such difference —

MR. D'AGOSTINO: I'm sorry. Apparently I failed to include the affidavit, Judge. My affidavit would just state for purposes of conducting competency that because it is a three and a half year old girl it should be an extensive examination conducted of her.

THE COURT: Well, I will conduct the examination. I will take into account any questions that anybody wants me to ask. I don't promise to ask them, but I will certainly consider them. I will certainly consider the questions that you are suggesting, and is [*sic*] Ms. Parr has some suggestions I will consider those too.

We are going to do the competency examination tomorrow. This will be the first thing before we impanel a jury.

All right. So no action on this motion at the moment.

[12] Ms. Parr and Mr. D'Agostino, let's deal with Mr. D'Agostino's motions that, in essence, asks — headed Motion for Order in Limine but there are several like that, so I will describe it.

It seeks an order enjoining the Commonwealth during the opening from mentioning conversations the witnesss [*sic*] may have had with the complaining witness.

In what way, Ms. Parr, will the Commonwealth be prejudiced if your opening is limited to an opening along the style of the Commonwealth's evidence will show that certain thing s— describing them — occurred to the complaining witness, as opposed to what the complaining witness may have said to somebody?

MS. PARR: Well, your Honor, the Commonwealth's position is that in its opening statement it would state generally what its evidence would be, including what evidence the Commonwealth expects the child to give as testimony. In addition, I think it's important that the jury see that the child, in fact, did say things right after the incident happened, and that they would be hearing from those witnesses as to what the child said.

[13] I suggest, Your Honor, that the determination of whether or not these are, in fact, fresh complaint witnesses whose testimony is admissible, it is, of course, our position that it would be required in the opening statement —

THE COURT: All right. I'll continue discussion on this motion for a moment.

. . . . . .

[26] All right, now, let's deal with the issue of fresh complaint. I had assumed, perhaps incorrectly, that the Commonwealth's position was that the child made certain statements immediately on coming home she made certain statements to hospital personnel, and that those statements are admissible.

It was not clear to me until I got the papers on fresh complaint — in fact, it still isn't clear to me — if fresh complaint is the only ground which the Commonwealth is pressing as admissibility of those statements.

MS. PARR: Your Honor, when I read your ruling on the Motion to Dismiss, while discussing exicted [*sic*] utterances or spontaneous exclamations, it is the Commonwealth's position that the statements made to the mother — the Commonwealth alleges that when the child came home at 8 o'clock in the evening on Sunday, she was almost immediately put to bed, at which point the incident in the bathroom happened, at which time the statement came out and was made. Which I guess could be considered, although I hadn't thought of it along those lines, as an excited utterance.

[27] My position is that that would be fresh complaint because that was the first opportunity the child had to tell anybody had [*sic*] happened. She said "it hurts", or words along those lines. Then the stepfather came up and also heard basically the same words, and the child was rushed immediately to the hospital where she again repeated one or two sentences to the pediatrician. And then during the interview with the child psychiatrist, once again repeated and also elaborated somewhat on what had just occurred to her, or what had occurred to her in the recent past.

THE COURT: Well, the statements to the hospital personnel may be admissible on another ground, namely statements to a physician in connection with treatment.

MS. PARR: Well, certainly, Your Honor, I would suggest that the one statement made to this pediatrician would certainly come under that. As he is examining her and he says, how did you get hurt or what happened. And her response being, pointing to the area and saying "Daddy pushed me", I believe was the response. Certainly that could be considered a statement made to the physician.

MR. D'AGOSTINO: I don't even know **[28]** if that can be considered a fresh complaint.

THE COURT: Well Dr. Tomlinson, the child psychiatrist, is a woman.

MS. PARR: Yes, Your Honor, I also mention Dr. St. Lewis, she made the one statement in there and was the pediatrician who saw her just prior to Dr. Tomlinson, or spoke to her.

They are all, Your Honor, within a period of hours after the child went home. I would suggest, Your Honor, that the case law indicates that this is exactly the kind of evidence that is allowable in this case, and I would urge Your Honor to allow all those witnesses to testify.

The case law indicates that questioning, just because the testimony comes from questioning doesn't make it inadmissible. And, in fact, with young children — especially a three-and-half-year old, you have to expect that it would only come from a certain amount of questioning after the spontaneousness of the first initial conversation she had with her mother and stepfather.

And it is under that position, your Honor, that the Commonwealth suggests that all of that evidence is admissible.

THE COURT: Mr. D'Agostino?

[29] MR. D'AGOSTINO: Well, if Your Honor please, with regard — just set aside the psychiatrist because clearly that's a fresh complaint. I will concentrate for the moment on the statements made to the mother.

THE COURT: Yes.

MR. D'AGOSTINO: With regard to the excited utterances, I don't believe it's an excited utterance. She came home, she was calm, she didn't raise a commotion or anything else until she went to the bathroom, Judge.

THE COURT: Hold on a second. Let me just set a definition. Excited utterance, as that term is used, doesn't mean that somebody is ebuliant [*sic*], it means that they are still under the influence of the episode that they are relating.

MR. D'AGOSTINO: Well, that is a fact that the jury has to find before you allow the excited utterance in, I would say has to find that it is an excited utterance. And I am saying it's

not because when she came home she was perfectly calm, and she was half asleep. She kissed her father good-bye.

It wasn't until the mother put her on the potty to go to the bathroom that she urinated, **[30]** then she started to scream and the mother asked what happened. I don't believe that comes in as an excited utterance. Okay, that is number one.

My other objection is it comes in, if it comes in at all, as a fresh complaint, Judge. And there are cases on it that say that excited utterances of this type do not come in as a res gestae. They come in as a fresh complaint.

if Your Honor pleases, I could just cite —

THE COURT: I know what you are talking about. Those cases don't involve three-and-a-half year old children.

MR. D'AGOSTINO: But, you know, it's just as hard for a defendant, the defendant in the case against a three-and-a-half year old as it is for anyone else.

THE COURT: Of course. My point is, though, that in fashioning the fair rule of evidence or applying the fair rule of evidence, or applying the rule of evidence fairly one has to take into account to some extent the circumstances, what would not be an excited utterance in a technical sense for a thirty-five year old woman might well be an excited utterance for somebody one-tenth that age.

[31] MR. D'AGOSTINO: I am certain Your Honor knows this case, *Commonwealth* vs. *Angen*, 357 464 at page 466. "We have stated that utterance of a fresh complaint is not admitted as part of the res gestae, or evidence as the truth of the things alleged, or solely for the purposes of disproving consent, but for the more general purpose of confirming testimony."

And it's traditional that that's — and I am not saying you have to follow tradition, but the reason for the fresh complaint, I mean that is the reason for the fresh complaint. And I am saying — I will say this further, Judge, if you are going to allow it in as an excited utterance I would ask Your Honor to

have a preliminary hearing to determine whether or not it's an excited utterance because I don't think it is.

THE COURT: All right. Let me reserve for a minute and hear argument — assuming I am going to allow some or all of this in — why shouldn't the child testify first, Ms. Parr?

MS. PARR: Your Honor, I would suggest for a few reasons. First of all, the very basic reason that if the child testifies first, without the mother having testified, because of the **[32]** sequestration order, the child would have to testify without a parent being present in the room. She is only three years and eight months, and I would suggest that that is a burden that shouldn't be placed on a young child. I think that court is a scary enough place for young children to deal with, then to have to come into a room this size without mother or stepfather, with only the alleged perpetrator in the room close to her, and have to be able to sit here and tell a bunch of strangers what happened.

So basically it's just a logical way, I would suggest, to prevent that from happening. So that if the mother testifies first then there would be no problem with her having heard what the child said and being able to change her testimony or any allegations of possible wrongdoing.

In addition, Your Honor, I think it is important, it would help the jury's understanding basically setting the scene. I could do that to a certain extent in my opening statement, but I suggest it would aid the jury in understanding this case better.

And as regarding a possible argument that, you know, I know that a fresh complaint doesn't **[33]** come in until the witness testifies. But if, in fact, the young child is unable to testify in this case. If she comes and sits here and says nothing the case ends basically. That is the reality of the situation, if the child is unable to testify that is the end of the case.

So that if mother testifies first I suggest that there isn't harm and I would suggest that it would probably be outweighed by

that fact, that the child would be comfortable because the mother would testify first, to make Krystin [*sic*] a little more comfortable because the mother could be present in the back of the courtroom while the child testifies and it would enable the jury to understand things better.

. . . . . .

[36] THE COURT: I am going to follow the usual order and we will have, before we have any testimony about what the complaining witness said, you will have the complaining witness herself testifying.

. . . . . .

July 10, 1985

[37E] *The trial justice conducted a preliminary voir dire of the complaining witness (excerpts from which are reproduced within Appendix C at 21a-23a), her mother, her step-father and the victim-witness advocate, and heard arguments from the prosecutor and defense counsel.*

THE COURT: All right. Thank you both very much. The Court has had a great deal of input from both counsel in this critical matter.

There is a distinction between whether a person ought to be allowed to testify and whether the person's testimony is found by a tryer of fact **[37F]** to be believable. On the basis of the inquiry that I conducted not only of the child but of three other witnesses, I conclude that the child does know the difference between telling the truth and telling a lie, and that other considerations are properly left for appropriate cross-examination. So I find her competent to testify.

MR. D'AGOSTINO: Note my objection.

THE COURT: Very well.

. . . . . .

[38] (Jury selection, Ms. Parr's opening statement, Judge's remarks to jury)

THE COURT: Call your first witness, please.

MS. PARR: Your Honor, I know it's an unusual request and I understand that Your Honor doesn't like to do things at the very last minute. However, I have gone outside to speak to the child. She has been here for five hours already. She is crying; she is upset. I don't think at this point I could get her in here to spend the next half hour and probably longer. She would probably have to come back anyway.

I am respectfully requesting of the court that we bring her back early in the morning and start in the morning. I know it's unusual, but I don't believe she is going to be able to go through with it today.

MR. D'AGOSTINO: Judge, I am in a very difficult position. I don't want to put that little girl through any more agony than she has to, but there has to be a resolution here. She has been, as I say, rehearsed a number of times by different people. This would give them another **[39]** chance to rehabilitate her and bring her back and talk with her. I think she can start it.

THE COURT: What other witness do you have, Miss Parr?

MS. PARR: Your Honor, I have the mother, Kristin's mother, Kathy Rawson, is here. I have instructed everybody involved in this case not to speak with the child regarding anything involving this case.

MR. D'AGOSTINO: She still goes home with the mother, Judge. I don't mean to be —

THE COURT: What do you suggest, Mr. D'Agostino? I will listen to any reasonable suggestion.

MR. D'AGOSTINO: I suppose we should get started, Judge.

THE COURT: Why don't we see what happens, Miss Parr? Nobody wants to cause the child any extra problems, as Mr. D'Agostino has said, but its 12:30 now and there is certainly a chance that the child might be finished and not have to come back.

. . . . . .

[41] (Jury is brought in)

THE COURT: All right, you may commence.

MS. PARR: Your Honor, the Commonwealth would call Kristin Brasculis [*sic*].

KRISTIN BRASCULIS [*sic*], Called

Direct Examination

BY MS. PARR:

Q Kristin, you will tell the truth?

A Yes.

MS. PARR: May I proceed, Your Honor?

THE COURT: You may.

BY MR. [*sic*] PARR:

Preliminary questions to the witness by the prosecutor

. . . . . .

[48] MS. PARR: Your Honor, at this point I would ask the court to get the dolls.

THE WITNESS: I want the boy doll. Take his pants off.

BY MS. PARR:

Q Kristin, if I ask you look at this boy doll, can you tell what I am pointing to?

A Eyes.

Q What is this I am pointing to?

[49] A Nose.

Q What is this?

A Mouth.

Q What are these I am pointing to?

A Fingers. I'm not going to say it anymore.

Q What am I pointing to here?

A I don't want to say it anymore. Can I see his body, please?

Q Why don't you show us where his body is?

A No. I want you to take it off.

MS. PARR: Judge, with your permission I will take off the pants.

I have the pants of the boy doll off now.

BY MS. PARR:

Q Can you show me where the body is, as you call it?

A (Witness indicates)

MS. PARR: Your Honor, may the record reflect the witness has touched the penis of the male doll?

THE COURT: Yes.

BY MS. PARR:

Q how about if we take this girl doll now, **[50]** put the boy doll down here?

A No, I want to hold him. Okay, I'll take his pants.

Q I'll help you take his pants off, if that's what you want, okay.

A That's what daddy has.

Q Right, okay. And if I were to show you just for a moment here, Kristin, could you look at this doll for a second? What is this on this doll, what is this on this girl doll I am pointing to now?

A Eyes.

Q What is this I am pointing to on the girl doll?

A Mouth.

Q What is this I am pointing to on this girl doll?

A Knee.

Q What am I pointing to on this girl doll now?

A Hand.

Q Can you show on this girl doll —

A You've got to take her panties off.

Q I have to take her panties off?

A How about if we put the panties on him, and **[51]** put the slacks on her.

Q If I take the panties off, can you show us — if I take the panties off, Kristin, can you show us where you got hurt?

A I have to take it off.

Q You have to take it all off?

A Yes, and I'll put it on the boy.

Q Kristin, can you point for me, please, and show me where you got hurt?
A I don't want to.
Q You don't want to, but it's okay to tell all these people.
A I don't want to.
Q Can you try?
A No, I don't want to.
Q Can you show us with the boy doll how Rick hurt your body?

MR. D'AGOSTINO: I object to that, Judge.

THE COURT: I can hear you well. Objection sustained.

BY MS. PARR:

Q Can you show us with the dolls what happened?
A Can you give her panties to him?

[52] Q Can you describe for us, Kristin, what Rick did?

MR. D'AGOSTINO: I object to that too, Judge.

THE COURT: I am going to suggest rather strenuously that no leading questions be asked at this point.

BY MS. PARR:

Q It's very important. Can you listen to my question now?
A Uh-huh.
Q If I show you this girl doll, can you show me, Kristin, what got hurt?
A I didn't ask you —

MS. PARR: I would renew my motion to recess until tomorrow.

THE COURT: Kristin, why don't you step down for a second and maybe Miss Lust can take you out.

. . . . . .

THE COURT: Ladies and gentlemen, I tell you what. I think I am going to give you a little extra time at the moment because I have to talk with the lawyers about a legal matter, and rather than pulling you in and pulling you out — **[53]** we don't usually break before one o'clock, I can promise you, but we will today.

. . . . . .

[53C] (Jury is dismissed).

THE COURT: You may proceed.

MR. D'AGOSTINO: the problem I've gotis [*sic*] Ms. Parr making references to what Rick did to her. There are two things involved. There has to be a distinction made and I think the child should make the distinction, not Ms. Parr. And I don't think Ms. Parr should be leading in that area.

It's apparent the little girl has been gone over with those dolls, I know she has on a number of occasions. And, like I say, we don't know where reality begins with this child and where it ends.

THE COURT: Well, I tell you, Ms. Parr, when a child, this child, declines to answer the question there are many reasons why the child could be declining to answer. The child might be tired, might be bored, be unhappy, or might be deciding that the answer that is sought from the child is not the answer that for whatever reason, including the fact that it might not be true, that the child doesn't wish to give.

So I do think it's crucial not to lead the child. I do think it's crucial to phrase your questions in terms that are totally neutral.

. . . . . .

July 11, 1985

[54] THE COURT: We will proceed.

KRISTIN BRASGULIS [*sic*], Resumed

BY MS. PARR:

Q Can you have a seat here, Kristin, please?

A Yes.

THE COURT: You can stand on the chair if you want.

THE WITNESS: Okay.

BY MS. PARR:

Preliminary questions to the witness by the prosecutor

. . . . . .

[55] Q Kristin, if I hand you this doll, can you show me in this doll where you got hurt?
A What is this silly dress?
Q Can you show me —
A I can't reach it. There are underpants on.
Q Do you want me to take the underpants off?
A Yes.
Ms. PARR: Your Honor, with the Court's **[56]** permission.
BY MS. PARR:
Q Okay, Kristin, I am now taking the underpants off. So all the jurors can see, can you show where you got hurt?
A Here, it was in there. I just ponted [*sic*] already.
Q I don't think everybody was able to see. Can you point again?
A (Witness points)
Ms. PARR: Your Honor, may the record reflect the witness is pointing to the area between the legs of the female doll?
THE WITNESS: Can you talk here?
BY MS. PARR:
Q Kristin, do you have a name for that part of the body? What is that called? Do you know what that is called?
A No. Can you get the boy one, please?
Q In a minute, Kristin. Can you show us how your body got hurt?
A I just told you.
Q I know you pointed, Kristin. Can you use your finger and show us how your body **[57]** got hurt?
A I just did it already,
Q Can you do it one more time, please?
A No.
Q Can you try very hard and do it one more time for the people so they can see?
A I did it.
Q Okay. I am going to put the girl away for now.

A Put her pants — I want to sit this way.
Q Kristin, facing these people —
A You've got to take his pants off.
Ms. PARR: With Your Honor's permission, I will take the pants off.
THE WITNESS: I've got to sit back.
BY MS. PARR:
Q Okay. Now, Kristin, I am taking the pants off of the doll.
Can you show us on this doll where his body is. Kristin, please?
A (Witness touches doll)
Ms. PARR: Your Honor, may the record reflect the witness has touched the penis of the male doll?
THE WITNESS: That's a boy.
[58] BY MS. PARR:
Q Can you tell us what hurt your body?
A I already did.
Q Can you do it one more time, please?
A No.
MR. D'AGOSTINO: I object, if Your Honor please.
THE COURT: On what grounds, in a word?
MR. D'AGOSTINO: She is leading again.
THE COURT: The question as put is appropriate.
MR. D'AGOSTINO: Note my objection.
BY MS. PARR:
Q Kristin, I know this is tough but could you please show what hurt your body?
A I just did, please.
Q You just did?
A Please.
Q You just pointed to what hurt your body?
A Yes, already, —
Q When you turned that way, you already pointed?
A Yes.
Q Can you show me once again on this doll? **[59]** Can you sit here, please, okay? Can you please point —

A No, I don't want to get down.
Q Kristin, can you stand on the chair for a few minutes? We only have a few more questions.
A I am going to turn this way.
Q Okay.
A So that I don't see him.
Q Can you tell us or show us where this part of the body went? Can you show us where that went? Are you pointing at Something, Kristin? Can you stand up on the chair, please, for a minute, and do that?
A No, I don't want it.
Q Can you stand up so the jurors can see? It's very important, please.
A I'll go this way.
Q Can you point again where the spot —
MR. D'AGOSTINO: I object.
BY MS. PARR:
Q Can you face these people here and point —
A I can't think about it.
Q I know it's tough.
[60] A I want something to eat.
Q When you are done here you can have something to eat. Can you point, Kristin, where this part of the body hurt?
A I don't think I could. I already did.
Q You already did, okay. Now can you tell us, Kristin, who hurt your body?
MR. D'AGOSTINO: I object once again to the leading.
THE WITNESS: Who sits there?
THE COURT: The objection is sustained.
THE WITNESS: Who sits there?
THE COURT: The witness may be asked how her body is hurt. She has tesitified her body was hurt. She may be asked how, but she may not be led.
MS. PARR: Most respectfully, who hurt your body was the question.

MR. D'AGOSTINO: That is leading question.

THE COURT: Rephrase it, Miss Parr.

BY MS. PARR:

Q Kristin, do you see the person in court today?

[61] A Yes.

Q Can you point out who that person is?

A (Witness points)

MS. PARR: Your Honor, may the record reflect she is pointing towards the defendant, Mr. Brasculis [*sic*]?

THE COURT: Very well.

MR. D'AGOSTINO: I don't know if that's so or not, Judge.

THE COURT: I'm sorry. I didn't realize it was an indication.

(To witness) Can you look again to the person you pointed to. Is he wearing a tie or not?

THE WITNESS: Yes.

THE COURT: What color is his tie?

THE WITNESS: Red.

MS. PARR. May the record reflect she has now identified the defendant, Mr. Brasculis [*sic*]?

THE COURT: Any objection?

MR. D'AGOSTINO: Yes, I object.

THE COURT: To the identification?

MR. D'AGOSTINO: Yes.

THE COURT: On what grounds?

MR. D'AGOSTINO: I don't want to say it **[62]** in front of the jury, Judge, I don't think it will be necessary to let it go out, Judge. It will take just a moment.

I'll withdraw the objection.

THE COURT: Very well.

BY MS. PARR:

Q Kristin, if I were to give you one last time the boy doll and the girl doll —

A I can't tell you.

Q I understand that. Kristin, can you show what happened with these two dolls —

A Can I talk to them, please?
Q Why don't you sit —
MR. D'AGOSTINO: Who is she referring to?
BY MS. PARR:
Q Can you please, for the jury, just show what happened?
A No, thank you.
Q Kristin, when you say —
A Can I have that girl.
Q Why don't you stay here for a second, please?
A I want to get her. (Witness retrieves doll)
[63] A I want to hug her.
Q Would you just sit up here for a second, please? (Witness resumes stand)
A I want to stand up. You hold her.
Q Can you tell us, Kristin, where this was put —
MR. D'AGOSTINO: I object again to the leading character and to her putting her fingers on the male doll's penis in front of the little girl.
THE COURT: I think it would be best if the question were asked in a general way, direct the witness to describe any episode that may be pertinant [*sic*], rather than to do it in a leading fashion.

. . . . . .

[64] THE WITNESS: Can I go now?
BY MS. PARR:
Q A few more questions, okay? When you used to go visit Rick, Kristin,
A Can you give me candy, please?
Q Who else used to live with Rick?
A Can you get me candy, please?
THE COURT: We have a rule you can't eat candy in the court.
THE WITNESS: No, it's a plain one - it's a butterscotch, right?
THE COURT: Even butterscotch we can't eat in the court.

THE WITNESS: No, they are all suckable out there, out where the dirty floor is.

THE COURT: The dirty floor?

THE WITNESS: Yes, that's where I **[65]** mean.

THE COURT: That's called the outside lobby. You can eat candy there, but not in the courtroom. It's my fault. Listen to Miss Parr and you answer what Miss Parr's questions are.

THE WITNESS: Your name isn't that name.

BY MS. PARR:

Q What is my name?
A Audrey. Her name is Audrey.
Q Now, Kristen, who lives with Rick?
A Grammie.
Q Anybody else?
A No.
Q When you used to visit Rick, who else would be there?
A Grammie.
Q The last time you went to visit Rick, do you remember being in the bathroom?
A Uh-huh.
Q Can you tell us what happened in the bathroom?
A Uh-huh.
[66] Q Why don't you turn over here so everybody can see you, and tell what happened in the bathroom.
A (No response)
Q Kristin, do you think you can tell?
A No.
Q Why don't you try?
A I don't want to.
Q Were you alone in the bathroom, or was someone else with you?
A Somebody else.
Q Who was with you.

A Somebody yuccky.
Q Somebody yuccky, who was that?
A With a yuccky costume on.
Q Who was with you in the bathroom, Kristin?

MR. D'AGOSTINO: I object, if Your Honor please.

THE COURT: She has testified someone was with her, and the question is who was the somebody.

MR. D'AGOSTINO: We don't even know when or where.

THE COURT: The question was the last time she visited Rick.

[67] BY MS. PARR:

Q Do you see the person in court today who was with you in the bathroom?
A Right there.
Q Can you say yes or no, Kris?
A No.
Q You say right there. What do you mean by that?
A No.
Q Can you tell us what happened in the bathroom, Kris?
A That one right there with the red tie.
Q With the red tie. Will you tell what happened in the bathroom with Rick?
A I can't.

MR. D'AGOSTINO: I object again to tell what happened in the bathroom with Rick. We haven't even established that Rick was in there, as far as I know.

THE COURT: The question was who was with you, and she pointed and said him with the red tie.

MR. D'AGOSTINO: We don't know if she means with her in the house, in the bathroom, or **[68]** where.

THE COURT: I understand your objection, Mr. D'Agostino, but the question directed the witness' attention to the bathroom.

BY MS. PARR:

Q Kristin, can you please sit back in the chair, please?
A I don't want to.

Q Can you tell the jurors what happened with Rick in the bathroom?
A I said I don't want to do anymore.
Q I understand that, Kristin, but you have to. Can you answer a few more —
A In the morning can I do it, please?
Q This is the morning, Kristin.
A No, can I do it in the morning later?
Q No, Kristin, we have to do it now. Okay?
A No, the judge —
Q Sit back in the chair, we are almost done.
A No, I don't want to.

Ms. PARR: If I might request a brief recess?

THE COURT: We will take a recess.

[69] THE COURT: Members of the jury, we will take a recess now.

(Jury is excused)

THE COURT: Miss Parr and Mr. D'Agostino, I think we all realize there are various difficulties pendant on the matter. I am going to give appropriate scope to examination, Ms. Parr and Mr. D'Agostino, you are perfectly proper in making whatever objections you think are to be made. I am particularly sensitive to the possibility of leading the witness, and I am particularly sensitive to the possibility of the witness, in fact, asking for candy, with the possibility of a suggestion to the witness — unintended, perhaps — by counsel that if the witness will only give certain answers, then she can have the candy.

. . . . . .

[72] THE COURT: I tell you what I am most concerned about. The witness has now twice said, in words and substance, once yesterday and once today, "I don't want to do that anymore"; "I don't want to talk about that anymore."

Now that is consistent with two things. One, that she doesn't want to relive an experience or, two, that she doesn't want to

persist in talking about a non-experience, that is to say, that she does not wish to go any further with a statement which she recognizes is not so.

. . . . . .

The trial justice conducted a second voir dire of the witness (excerpts from which are reproduced within Appendix C at 23a-24a).

[85] MR. D'AGOSTINO: I am moving for a finding of not guilty, Your Honor, or in the alternative, dismissal with prejudice.

MS. PARR: Your Honor, I would object to either one of those situations.

I still suggest to you that the child is competent, that she understood yesterday, that she clearly doesn't want to talk to you at this point. I know that is a problem, Your Honor, but I don't suggest that a dismissal order of required finding of not guilty is a remedy at this point.

[86] If Your Honor is considering declaring her incompetent at this time, then I suggest the remedy is a mistrial, and not a dismissal or certainly not a required finding of not guilty.

THE COURT: I will tell you the problem.

In the first place, Miss Parr, I have to disagree with you. The child was perfectly willing to talk, and she answered all the questions. She answered them in a way, however, which causes me grave concern because yesterday her chief, in fact, her only way for distinguishing between the consequences of telling the truth and the consequences of telling the lie was that when you tell a lie, you get punished. And she repeated that distinction today, I think we can all agree on that. That it's good to tell the truth and when you tell a lie you get punished.

When I asked her what it meant to be punished, however, she said she didn't know. Further, when in response to a useful suggestion I suggested to her or asked her about certain of the more common phrases for the more common method of punish-

ing a child, she answered quite openly and promptly that she didn't know.

[87] So I'm left with a situation in which a witness, in response to questions designed to elicit whether the witness knows the difference between telling the truth and telling a lie, responds to me, when you put all the answers together, that telling a lie gets you punished but she doesn't know what punishment is.

I pass over the question of whether a three and a half year old child would use the word punishment, would use it if it were not connected with some specific physical or other consequence.

Ms. PARR: Well, Your Honor, I still suggest she did indicate she knew the difference between the truth and a lie, that a lie was bad, not necessarily what punishment was. She has in the past discussed with me what punishment is, but that is neither here nor there for purposes of today.

She did indicate that a lie was bad and that telling the truth was good. She still indicated knowing the distinction between the two. I think good and bad are a little bit more realistic words to a three and a half year **[88]** old, as opposed to punishment. And I think that she understands the reality of that.

THE COURT: The word punishment — and the record will bear me out — the word punishment first came into the dialogue through her mouth, and not mine.

Ms. PARR: I understand that, Your Honor, I understand that. But I also would suggest that she has always put that word along with that it happens when you are bad and it happens when you tell a lie, and that the truth is what you want and that lies are what you don't want.

THE COURT: I would also emphasize that I pass over another prospective problem, and that is that the child perceives a certain response to entail punishment, to entail a bad result, and a certain other response to entail a good result, approval by an adult, for example. There is the serious problem of the child responding to the desire to please the adult. However, I

leave that, as it is not pertinant [*sic*] to competence. I want you to know it is not what I am taking into account.

What I am taking into account is the fact that, to put it bluntly, the child does **[89]** not seem to know the difference between the consequences of telling the truth and telling a lie, and that bothers me. Because if the appellate court has told us anything on the subject, it is that as long as the witness understands the difference between a lie and the truth and understands the consequences of telling a lie, then the witness is competent. It seems to me I am missing one of the necessary pins here.

MR. D'AGOSTINO: There have to be sanctions imposed, Judge. Every witness that takes the stand, if it's an adult, knows that he can be punished for perjury if he tells a lie. And it has to be, in order — if she knew maybe that she — I'll rest there, Judge.

. . . . . .

THE COURT: I will bring the jury back in and I will let Kristin take the stand again, and I will let you complete what examination you want to complete.

And at the close of that examination if Kristen has indicated that she understands **[90]** what the consequences of telling a lie are. Then I will permit the proceedings to go further. If she doesn't, I will entertain the defendant's motion and I will, of course, hear your argument. I will hear whatever remedies the parties want to argue.

Yes, Mr. D'Agostino?

MR. D'AGOSTINO: I object to the proceedings going forward. I think Your Honor has already made a finding, not saying in so many words, you have already found that the child is incompetent. I mean, that's —

THE COURT: No. I haven't made that finding yet. I may well make it, but I haven't made it yet.

MR. D'AGOSTINO: I am objecting to the proceddings [*sic*] going forward.

THE COURT: I understand.

MR. D'AGOSTINO: I am moving once again for either required finding of not guilty or a motion to dismiss with prejudice.

THE COURT: Why are you not moving for a mistrial?

MR. D'AGOSTINO: I don't think that the defendant on that charge should have to go through another trial, Judge. That is how deeply I **[91]** feel about it. I don't think that that three and a half year old child would be any more able to testify some months from now without the aid of all these adults that they have rehearsing her, just giving her another chance to be rehearsed all over again. I think it's going to do some grave psychological damage to that child.

THE COURT: All right. Thank you. Bring the child back in. And bring in the jury.

. . . . . .

[92](Jury is brought in)

THE COURT: Thank you for your patience, ladies and gentlemen.

Kristin, if you would come back here, please.

MR. D'AGOSTINO: I think she said she didn't want to, Judge. They are carrying her.

MS. PARR: She won't go and answer anymore questions.

THE COURT: Kristin, would you be willing to come up here and sit in this seat here, where you have been before?

THE WITNESS: No.

MR. D'AGOSTINO: If Your Honor please —

THE COURT: Just a moment. I understand, Mr. D'Agostino.

The witness is shaking her head quite vigorously.

MS. PARR: That is true, Your Honor.

[93] THE COURT: Does that mean, Kristin, that you don't want to come up here?

THE WITNESS: No.

THE COURT: The witness has turned her back on the Court and the jury and is shaking her head. It seems obvious to the Court that she does not wish to testify.

Am I correct in my impression, Ms. Parr?

MS. PARR: Yes, Your Honor, I believe you are correct at this point.

THE COURT: Very well. Miss Lust, perhaps you could take Kristin out of the courtroom? (Witness leaves courtroom)

THE COURT: Members of the jury, I am sorry but once again I will have to ask you to step out while I talk to the lawyers. (Jury is excused)

MR. D'AGOSTINO: I am making a motion, and I have a written one if Your Honor wants one, of a required finding of not guilty. If I may have a moment, Your Honor? (Pause)

MR. D'AGOSTINO: I have two motions, **[94]** one for each indictment.

THE COURT: Am I correct in my assumption, Ms. Parr and Mr. D'Agostino, that the situation is one in which a witness, for whatever reason not the fault of the defendant, is not available for cross-examination by the defendant?

MS. PARR: The witness is not available for cross-examination by the defendant, Your Honor, yes.

THE COURT: Analytically, that is the situation at the moment. Do you agree, Mr. D'Agostino? Mr. D'Agostino?

MR. D'AGOSTINO: I agree that she is available but that I am unable to cross-examine her.

THE COURT: She refuses to testify, so her direct examination is incomplete. Even if the direct examination were declared complete either by Ms. Parr or by the Court —

MR. D'AGOSTINO: I wouldn't be able to cross-examine her.

THE COURT: Why is a required finding of not guilty the appropriate relief? I can understand the motion for a mistrial.

[95] MR. D'AGOSTINO: Because without the little girl there is no evidence. There is absolutely no evidence without the little girl's testimony. And I think he is entitled to a required finding.

Besides that, even with a mistrial there would be serious consideration whether double jeopardy has attached in this situation. Because it has been put to trial once, and if it's going to be the same trial again, if she has been rehabilitated and wants to testify at a later date, I seriously consider whether you could put her on trial again. I believe double jeopardy is attached to it. You can't continually try somebody.

I don't know of any case that says that you can stop a trial like this and declare a mistrial where a witness did not want to testify today, but maybe a month later does.

But I think what is appropriate is a required finding of not guilty because they have not produced a prima facie case.

Ms. PARR: Well, Your Honor, my position is that the appropriate remedy is a mistrial because we never rested, we never finished presenting evidence in the case, and therefore because the situation, the unavailability of Kristin **[96]** to complete her direct or, even if that were complete, to be available for cross-examination, the remedy is a mistrial. That is not to say that we would necessarily try the case again, but I believe the appropriate remedy is a mistrial, not a required finding and I would request you declare a mistrial.

MR. D'AGOSTINO: I don't agree. If Your Honor was to order them to go forward and they said I can't go forward because my witness will not testify, I am entitled to a not guilty, Judge.

THE COURT: Well, that is the situation we are in. The government can't go forward because the complaining witness' testimony hasn't been completed and hasn't been — and she is not subject to cross-examination, not because of illness or because of some natural catastrophe, because the witness declines to continue.

Now if an adult witness declined to continue, one would consider sanctions in the way of contempt and so forth. With a three and a half year old child I guess we are all in agreement, aren't we, Miss Parr, that contempt is not appropriate?

MS. PARR: Yes, Your Honor.

[97] THE COURT: So we are in the situation, we are in the exact situation where we would be if prior to the start of a trial not involving a child an adult complaining witness refused to go forward. That happens from time to time, and when it happens the government at that point usually dismisses the case, or on a motion of the defendant the matter is dismissed for want of prosecution.

Am I right that that is the normal way, Ms. Parr?

MS. PARR: Your Honor, I have never had a victim not testify, so I am not really sure.

THE COURT: Mr. D'AGOSTINO?

MR. D'AGOSTINO: Well, if Your Honor please, I think you hit the nail on the head when you said that you can impose sanctions on an adult and force them to go ahead and testify. Obviously you can't enforce sanctions on a three and a half year old child because she doesn't understand what sanctions are, and I am certain you are not going to do it anyway, Judge.

So it's the situation where you can't allow — I mean, there has to be an end to **[98]** the proceedings and a proper end to the proceedings is a required finding of not guilty. And I am insisting on that for other reasons, not just because of double jeopardy, Judge.

THE COURT: Suppose you tell me about them.

MR. D'AGOSTINO: His parole has been violated as a result of this case and there could be — if it's a mistrial, he has been in jail since his arrest in March, and if there is a mistrial declared he stays in jail until there is another trial.

And I think that's cruel and unusual punishment at this stage of the game.

THE COURT: It's not punishment.

MR. D'AGOSTINO: Well I am just — you know, why should he be subjected to that, Judge.?

THE COURT: Ms. Parr, why is it inappropriate to dismiss for want of prosecution?

Ms. PARR: Well, Your Honor, I am not sure. If Your Honor had found her incompetent when you did — when you stopped and you asked the competency question, you didn't actually find her incompetent.

[99] THE COURT: I now — in order that the record will be very clear, I now find her incompetent.

Ms. PARR: You now find her incompetent. Your Honor, I suggest that that makes her unavailable, through no fault of anybody, and that because she is incompetent after her testimony begins, then I still think the appropriate avenue is a mistrial as opposed to dismissal for want of prosecution.

She did testify yesterday and was competent yesterday for a period of time, so that it wasn't that it was lack of prosecution at that time.

I just think that a mistrial is more appropriate.

THE COURT: I'll tell you what, if you both agree I will do this. I will dismiss the jury and I will give you both an opportunity to do some research and some thinking about what the form of the determination should be.

Ms. [*sic*] D'AGOSTINO: If Your Honor please, now that you have declared her incompetent, that is even another reason for a required finding of not guilty.

[100] To research this thing, and I think we are in a unique situation, Judge, because I am just relating it to experience.

Ms. PARR: Well, Your Honor, since Your Honor just declared that he did find her incompetent, I have to inform the Court I just received a note that says "Audrey, she says she will come back and she will answer Dag's" — Mr. D'Agostino's — "questions".

MR. D'AGOSTINO: Well, I object to that because obviously she has been rehearsed again, Judge, and I —

THE COURT: I have a situation where a witness who has shown great reluctance to testify has told me that as between telling the truth and telling the truth and telling a lie the differ-

ence is you get punished when you tell a lie but she cannot tell me, or would not tell me, what punishment meant, although I afforded her a large opportunity to do so. And that means, to me, that as a matter of law she is not competent and I have no choice but to declare that she is not competent, and that is fortified by the fact that she refuses to testify.

Well, my question is, are you willing **[101]** to do research? I won't do it unless both of you agree that I should delay my specific ruling on what the nature of the determination would be, until you have had a chance to furnish me with thoughts. Mr. D'Agostino says this is —

MR. D'AGOSTINO: I want it now, Judge. I want the decision now. I am urging for a required finding of not guilty because of my reasons that I stated. One, because he is entitled to it because this is the end of the case since you found her incompetent and I can't go forward. And, two, because the repercussions are that if he does not get a not guilty he could very well — his parole has been violated, he can't get out of jail until either he is returned on his parole violation or they release him.

So I am between a rock and a hard place. I have to insist on a required finding of not guilty in order to be able to get him out. And he has been in, like I say, he has been incarcerated since March. He had a good job, I believe he has probably lost the job now and everything else. So I don't think he should be punished any further.

THE COURT: Ms. Parr?

[102] MS. PARR: Well, Your Honor, I of course would like the time, but if Your Honor is forced into a decision today I would ask Your Honor to declare a mistrial.

THE COURT: I think under the circumstances the fairest thing is to dismiss for want of prosecution, that is because a witness cannot go forward. And that would terminate the matter at this point, and allow the Commonwealth to take whatever steps the Commonwealth thinks are appropriate.

Ms. PARR: That will terminate the case, period.

THE COURT: Yes, but if the Commonwealth wants to appeal the Judge's dismissal of the case, that is also possible.

Ms. PARR: Right, Your Honor. Thank you.

MR. D'AGOSTINO: Well, may that be with prejudice, Judge, the dismissal?

THE COURT: As far as I am concerned it's with prejudice. I only have the next to the last word on it.

MR. D'AGOSTINO: I understand, but I am asking for, if you are going to dismiss **[103]** the dismissal be with prejudice.

THE COURT: I understand your point.

MR. D'AGOSTINO: If it's a dismissal with prejudice, I want a not guilty but if Your Honor is going to dismiss it, I am asking that it be done with prejudice.

Ms. PARR: Your Honor, note my objection to that ruling.

THE COURT: All right, bring back the jury.